Supreme Court, U.S.
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No. 96-859

In the Supreme Court of the United States

OCTOBER TERM, 1996

STEVEDORING SERVICES OF AMERICA, ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

1. Whether the court of appeals properly affirmed the administrative law judge's calculation of respondent Charles Sproull's pre-injury average weekly wages for purposes of determining his entitlement to benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, to the extent that that calculation included vacation pay earned before, but received after, his injury.

2. Whether the court of appeals properly affirmed the adjustment of Sproull's actual earnings, in determining his post-injury wage-earning capacity, to reflect an increase in wage rates during the applicable period.

3. Whether the court of appeals properly affirmed the Benefits Review Board's decision to augment by 20% the interest component of Sproull's award in light of petitioners' failure to pay the interest within ten days after it became due.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 86 F.3d 895. The en banc decision and order of the Benefits Review Board on reconsideration (Pet. App. B1-B22), the initial decision and order of the Board (Pet. App. C1-C27), and the decision and order of the administrative law judge (ALJ) (Pet. App. D1-D13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1996. A petition for rehearing was denied on August 30, 1996. Pet. App. F1-F2. The petition for a writ of certiorari was filed on November 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, compensates injured workers for "disability," defined as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10); see *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2148 (1995) ("The fundamental purpose of the [Longshore] Act is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury."). When an injury results in permanent partial disability, loss of earning capacity is measured by comparing an employee's pre-injury "average weekly wage[s]" under Section 10, 33 U.S.C. 910, with his post-injury "wage-earning capacity," 33 U.S.C. 908(h). The employee is entitled to benefits equal to two-thirds of the difference between his average weekly wages and his wage-earning capacity. 33 U.S.C. 908(c)(21).

2. Respondent Charles Sproull was employed as a longshoreman by petitioner Stevedoring Services of America, when he tore a tendon in his left shoulder during a fall at work on January 10, 1985. Pet. App. A2, B3, C2-C3. He received temporary total disability benefits until he was able to return to work on September 16, 1985. *Id.* at A2, B3, C3. After returning to work, however, Sproull was unable to work on

higher paying night or linesman jobs, as he had done prior to his injury. *Id.* at A2, D2. Sproull therefore claimed permanent partial disability benefits under the LHWCA based on a loss of wage-earning capacity. *Id.* at A2-A3.

Following a hearing, an administrative law judge (ALJ) issued a decision and order awarding Sproull temporary total disability benefits for the post-injury period during which he was unable to work, and permanent partial disability benefits for the period thereafter. Pet. App. D1-D13. In computing Sproull's average weekly wages for the year preceding his injury (January 11, 1984-January 10, 1985), the ALJ held that such wages should include holiday and vacation pay earned during that year, despite the fact that under the union contract governing Sproull's employment, such pay was not received until the following year. *Id.* at D3-D4. Thus, the ALJ "add[ed] to [Sproull's] 52 week earnings of $37,935.34, the vacation and holiday, payments received in 1985 ($2,892.60 and $1,821.56)." *Id.* at D4. At the same time, the ALJ "subtract[ed] the vacation and holiday payments received in 1984 ($2,658.00 and $1,536.08)," apparently on the ground that those payments had been earned the previous year. *Ibid.*

The ALJ next considered whether Sproull had actually suffered a loss of wage-earning capacity for which he was entitled to disability benefits under the Act, in light of the fact that he had worked more hours and earned more money after returning to work than he had during the year preceding his injury. Pet. App. D5-D9. First, the ALJ found that Sproull's average wage during the three years after his injury ($43,451.69 annually and $835.60 weekly) was less than the total "adjusted" amount of his earnings

($44,437.67, or $854.55 weekly) in the year preceding the injury. *Id.* at D4, D6-D7.[1] Because the wage rate had risen by 15% during the intervening period, the ALJ concluded that Sproull's post-injury wages were "not a fair and reasonable measure of his post-injury earning capacity." *Id.* at D7-D8. Instead, the ALJ concluded that those "post-injury average earnings must be reduced [by 15%] to $36,933.94 annually and $710.27 weekly for purposes of comparison with his 'adjusted' annual earnings of $44,436.67 and $854.55 average weekly wage at the time of the injury." *Id.* at D7. The ALJ therefore found that Sproull was

> entitled to temporary total disability compensation from January 11 through September 15, 1985, at the rate of $569.70 per week (two-thirds of his average weekly wage at the time of injury), and that since September 16, 1985, he has been permanently and partially disabled within the meaning of the Act, and entitled to compensation at the rate of $96.19 per week (two-thirds of the difference between his average weekly wage at the time of injury and his wage-earning capacity thereafter).

Id. at D8 (citing 33 U.S.C. 908(b) and (c)(21)).

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[1] In calculating Sproull's "adjusted" wages for the one-year period preceding his January 10, 1985, injury, the ALJ observed that as a result of a prior injury to his left hand, Sproull had been unable to work for the first seven weeks of that period. Pet. App. D3. To the wages (including holiday and vacation pay) that Sproull had actually earned during that one-year period, the ALJ "add[ed] $5,981.85, which is the approximate sum [Sproull] would have earned in the seven weeks from January 11 to March 1, 1984, had he not had a prior injury." *Id.* at D4.

The ALJ also held that Sproull was entitled to interest "on any net amounts owing after a credit for any disability compensation previously paid, computed from the date each payment was due." Pet. App. D9. When petitioners failed to pay the interest component of the award within ten days of the filing of the ALJ's order, Sproull sought to have that amount augmented by 20% pursuant to Section 14(f) of the LHWCA, 33 U.S.C. 914(f). That provision states that "[i]f any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof." 33 U.S.C. 914(f).[2] The district director administratively denied Sproull's request. Pet. App. E1-E3.

3. All parties appealed to the Benefits Review Board, which affirmed in part and reversed in part. Pet. App. C1-C27. The Board disagreed with the ALJ's conclusion that the holiday and vacation pay that Sproull was paid in 1985 was earned in 1984. The Board therefore held that the holiday and vacation pay received by Sproull in 1984, rather than the pay he received in 1985, should be considered in calculating Sproull's average weekly wage for the year preceding his injury. *Id.* at C9-C11. The Board agreed, however, with the ALJ's decision to reduce Sproull's post-injury earnings by 15% in determining his entitlement to benefits. *Id.* at C14-C18. It explained that Sections 8(c)(21) and 8(h) of the Longshore Act, 33 U.S.C. 908(c)(21) and 908(h), "require that wages earned in a post-injury job be adjusted to the wages

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[2] The Act defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this chapter." 33 U.S.C. 902(12).

that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects." Pet. App. C17.

Sproull appealed from the district director's denial of his petition for a 20% penalty based on petitioners' late payment of interest. The Board reversed the district director's ruling, explaining that "interest is compensation for purposes of section 14(f) as this will ensure that all benefits intended to make claimant 'whole' will be promptly paid by employer." Pet. App. C24.[3]

The Board subsequently granted motions for en banc reconsideration filed by Sproull and the Director. With respect to the question whether vacation pay received by Sproull in 1985 was properly added to his 1984 earnings, the Board was evenly divided. See Pet. App. B3. With respect to holiday pay, all members of the Board agreed that the pay received by Sproull in 1984, rather than that received in 1985, should be used in calculating his earnings during the year (January 11, 1984-January 10, 1985) preceding his injury. *Ibid.*[4] Pursuant to 20 C.F.R. 801.301(c), the result of those votes was that the Board's prior decision was affirmed in its entirety. Pet. App. B3.

4. The court of appeals upheld the ALJ's decision to reduce Sproull's post-injury earnings by 15% in calculating his award. The court explained that "[a] disabled worker's post-injury earnings can only

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[3] One judge dissented from that aspect of the Board's decision. See Pet. App. C25-C27.

[4] The Board explained that "the holiday pay received in 1985 is compensation for a specific day in 1985, after the injury occurred, and should not be included in [Sproull's] pre-injury average weekly wage." Pet. App. B7.

'fairly and reasonably represent his wage-earning capacity' * * * if they have been converted to their equivalent at the time of injury." Pet. App. A6 (quoting *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 61 (2d Cir. 1989)). The court also held that the ALJ had reasonably included in Sproull's 1984 earnings vacation pay earned in 1984 but received in 1985, and that the Board had erred in reversing that determination. Pet. App. A7-A8.

Finally, the court upheld the Board's decision to increase by 20% the interest component of the award in light of petitioners' failure to pay the interest within ten days after it was due. The court noted that the LHWCA defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this chapter." Pet. App. A11 (quoting 33 U.S.C. 902(12)). The court observed that its prior decision in *Foundation Constructors, Inc.* v. *Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991), had "recognized the necessity of imposing interest on the delayed payment of compensation benefits." Pet. App. A11. The court stated that it would "defer to the Director's reasonable interpretation that interest is an inherent component of compensation and affirm the Board's imposition of a twenty percent penalty on [petitioners'] late payment of interest." *Id.* at A12.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners challenge (Pet. 11-16) the court of appeals' determination that the ALJ properly included in Sproull's pre-injury earnings the vacation pay

received during the year after his injury, rather than the vacation pay received during the previous year. Contrary to petitioners' argument (Pet. 13-15), the decisions in *Tri-State Terminals, Inc.* v. *Jesse*, 596 F.2d 752 (7th Cir. 1979), and *Walker* v. *Washington Metropolitan Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987), which involved the consideration of post-injury earnings in calculating average weekly wages, do not conflict with the decision below. The court of appeals did not suggest that money *earned* following Sproull's injury could be included in determining Sproull's pre-injury wages. Rather, it concluded that "Sproull *earned* the April 1985 vacation wages before his injury," even though he received them afterwards. Pet. App. A8. Because the court included those wages in the year earned, and thus calculated Sproull's average weekly wages "by looking at the claimant's * * * wages for a period *prior to the injury*," *Walker*, 793 F.2d at 321, there is no merit to petitioners' contention (Pet. 15-16) that the decision below overestimates Sproull's average weekly wages, or otherwise runs afoul of Section 10(c), 33 U.S.C. 910(c).[5] Whether or not Sproull's "wage-earning

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[5] Petitioners miss the mark in arguing that the court's treatment of Sproull's vacation pay undermines the uniform application of the LHWCA. While the Act was designed to "create a uniform federal workers' compensation law for maritime employees" (Pet. 12), calculation of a claimant's award requires an individualized determination of an employee's average weekly wages. See 33 U.S.C. 910 (prescribing methods for calculating employee's average weekly wage); 33 U.S.C. 902(13) (defining "wages" to mean "the money rate at which the service rendered by an employee is compensated by an

capacity" was affected by the date on which he qualified for a paid vacation (Pet. 15-16), it was proper for the ALJ to include such pay in the year it was earned in calculating his average weekly wage for that year. Pet. App. A8.[6]

2. Nor is there merit to petitioners' argument (Pet. 16-20) that the court of appeals erred in upholding the ALJ's 15% reduction in Sproull's post-injury wages to account for the intervening increase in the wage base. The LHWCA defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). In order to undertake a meaningful comparison between a claimant's pre-injury wages and his post-injury wage-earning capacity, and thus to determine whether a claimant is capable of "earn[ing] the wages which [he] was receiving at the time of injury," the relevant amounts must be expressed in constant dollars. The court of appeals' decision in this case is consistent with decisions of the First and Second Circuits recognizing that an accurate calculation of a worker's true loss of wage-earning capacity requires adjustment of his post-injury earnings to account for inflation. See *White* v. *Bath Iron Works Corp.*, 812 F.2d 33, 35 (1st Cir. 1987);

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employer under the contract of hiring in force at the time of the injury").

[6] The ALJ included in Sproull's 1984 wages the $2,892.60 in vacation pay that Sproull received in 1985 rather than the $2,658.60 that he received in 1984. See Pet. App. D4. (The ALJ's treatment of holiday pay was reversed by the Board, see *id.* at B3, and Sproull did not challenge that holding in the court of appeals.) The effect of the ALJ's decision regarding vacation pay was to increase Sproull's partial disability award by approximately $3 per week.

LaFaille v. *Benefits Review Bd.*, 884 F.2d 54, 61 (2d Cir. 1989); see also *Walker*, 793 F.2d at 323 n.5 (comparison between actual pre- and post-injury wages is "artificial" since such a comparison "fail[s] to take into account the fact that the [post-injury] dollars were inflated"). Cf. *Rambo*, 115 S. Ct. at 2150 (noting with apparent approval that the ALJ in that case, "recognizing that higher wages do not necessarily prove an increase in wage-earning capacity, took care to account for inflation * * * in evaluating [the claimant's] new wage-earning capacity") (internal quotation marks omitted). Petitioners cite no authority holding that such an adjustment is improper.[7]

3. Finally, petitioners contend (Pet. 20-29) that the court of appeals erred in affirming the Board's decision to increase by 20% the interest awarded by the ALJ. The Board's decision was based on 33 U.S.C. 914(f), which states that "[i]f any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof." Petitioners point out (Pet. 27) that no provision of the LHWCA expressly authorizes an award of interest. They argue (Pet. 28) on that basis that interest falls outside the Act's definition of "compensation" as "the money allowance payable

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[7] Petitioners rely (Pet. 16-17) on the Board's assertion that the ALJ "implicitly found [Sproull's] post-injury wages representative of his post-injury wage-earning capacity." Pet. App. C17. In fact, the ALJ found that Sproull's "actual wages since returning to work are *not* a fair and reasonable measure of his post-injury earning capacity." *Id.* at D8 (emphasis added). The court below properly affirmed, as supported by substantial evidence, that explicit finding by the ALJ. *Id.* at A5-A6.

* * * as provided for in this chapter." 33 U.S.C. 902(12). Petitioners contend that the court of appeals should not have given deference to the Director's view that interest is an element of "compensation" within the meaning of Section 914(f).

As petitioners point out (Pet. 20-24), the courts of appeals have expressed divergent views regarding the deference owed to the Director's interpretation of the Longshore Act.[8] The instant case, however, presents an inappropriate vehicle for resolution of that issue. Although petitioners speculate that "[p]robably no other judicial Circuit would have accepted the Director's interpretation of the term 'compensation,'" Pet. 29, they identify no case holding that interest is excluded from the "compensation" described in 33 U.S.C. 914(f).

As this Court observed in *City of Milwaukee* v. *Cement Div., Nat'l Gypsum Co.*, 115 S. Ct. 2091, 2096 (1995), "prejudgment interest is not awarded as a penalty; it is merely an element of just compensation." Petitioners do not deny that interest may be awarded in LHWCA cases generally, nor do they contend that the ALJ's award of interest was improper in the instant case. Indeed, they state (Pet. 28) that "an

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[8] Many of the cases cited in the petition predate this Court's decision in *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1287 (1995), which observed that the Director "has full power" to supersede the decisions of the Benefits Review Board by issuing regulations setting forth her own construction of the LHWCA. That statement surely presupposes that the Director's interpretation of the Longshore Act, at least if embodied in a regulation, is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

employer's failure to pay an award of interest may be dealt with under 33 U.S.C. § 921(d)."[9] So long as interest is an appropriate element of a Longshore Act award—and petitioners concede that it is—it is properly characterized as part of "the money allowance * * * provided for in" the LHWCA, and thus as "compensation" within the meaning of the Act. 33 U.S.C. 902(12). Section 914(f), which covers "any compensation, payable under the terms of an award," is therefore applicable by its terms to the interest component of the award. There is consequently no basis for petitioners' contention that the court of appeals would have resolved this issue differently if it had not given deference to the view of the Director.

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[9] Section 921(d) provides for enforcement proceedings in federal district court when an employer "fails to comply with a compensation order making an award[] that has become final." Because Section 921(d) applies only when an award "has become final"—*i.e.*, after any appellate review has run its course—it provides an inadequate substitute for an award of additional compensation under Section 914(f) where benefits have not been paid within ten days after they become due.

Indeed, petitioners' acknowledgment that Section 921(d) may be used to compel payment of interest substantially undermines their position. If interest is an element of a "compensation order making an award" within the meaning of Section 921(d), it should also constitute "compensation, payable under the terms of an award," within the meaning of Section 914(f).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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